In the Supreme Court of the United States

No. 77-1814

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

PETER SMITH,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

ARTHUR L. GOLDBERG,
GOLDBERG, EVANS & KATZMAN,
Attorneys for Respondent

16 North Market Square,
Post Office Box 966,
Harrisburg, Pennsylvania 17108
Telephone (717) 234-4161

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

TABLE OF CONTENTS

TABLE OF CASES

IN THE
SUPREME COURT OF THE UNITED STATES

No. 77-1814

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

PETER SMITH,
Respondent

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

COUNTERSTATEMENT OF QUESTIONS PRESENTED

---

1. Whether a series of material misrepresentations by a police officer affiant in the probable cause section of a complaint for search warrant shown at suppression hearings to be untrue and known by the police officer

affiant to be untrue at the time of the issuance of the affidavit require the invalidation of the search warrant as precluding an objective and detached determination of the existence of probable cause by the issuing authority?

2. Whether after removal of all such false statements in the complaint for search warrant, the Supreme Court of the United States should review the conclusion of the Superior Court of the Commonwealth of Pennsylvania and Supreme Court of Pennsylvania that the search warrant issued was indeed invalid, as without sufficient probable cause thereafter?

STATEMENT OF FACTS

On November 21, 1975, Trooper George A. Wynn of the Pennsylvania State Police filed a complaint for search warrant before District Magistrate Edward J. Carl of Magisterial District 09-1-02 of Cumberland County, through which the Trooper, as the Affiant, sought to obtain legal authority for the search of the designated premises for certain bookmaking paraphernalia for use as evidence in support of a charge of violation of Section 5514 of the Crimes Code, 18 Pa. C.S. §5514.

A timely application for suppression of evidence was filed on April 30, 1976, and, at the hearing thereon before The Honorable Dale F. Shughart, President Judge, on May 5, 1976, it was established that many material averments offered by the Affiant on the face of the complaint for search warrant in support of a finding of probable cause for the issuance of a search warrant were not true.

The Affiant stated that persons whom the Affiant had never met (R. 11a-12a) identified themselves by first and last names as being Pete Smith, Blanche (sic) Smith and John Smith, while taking bets over the telephone. In each case, and throughout the balance of the affidavit, the surname was capitalized. At the suppression hearing the Affiant admitted that last names were never used (R. 8a).

The District Justice was not told that last names were never used; in fact, as indicated, he was told that last names were used and the Affiant well knew that they were not used.

The Affiant makes a flat statement in the complaint for search warrant:

> "The Affiant became acquainted with Pete, John and Blanche SMITH through Robert Harry LONG, a person who took bets, and that through Long affiant was personally involved in playing football tickets with Pete SMITH and John SMITH."

In fact, the Affiant was never personally involved in such activity with any of the Smiths, nor did he observe Long or anyone else exchange any money or gambling paraphernalia with any of the Smiths (R. 8a-10a).

Moreover, Affiant admitted he had never met Pete Smith or Blanche (sic) Smith, and there is no affirmative statement in the record of the suppression hearing that he had ever met John Smith prior to the execution of the complaint for search warrant (R. 11a-12a).

The affidavit stated that Affiant had heard the voices of John and Pete Smith on numerous occasions during the investigation which began September 27, 1975, and therefore could identify positively their voices as being the voices of the persons who had accepted bets over the telephone. In fact, the Affiant had never heard the voice of Pete Smith after September, 1975 (R. 22a), and there is no affirmative statement in the record of the suppression hearing that he had heard the voice of John Smith subsequent to September, 1975. The only time Affiant recalled having heard the voice of Pete Smith was sometime between sixteen months to two years prior to the incident in question, and he had then heard it overhearing a conversation at a club.

There is no question from the testimony that the Affiant prior to November 21, 1975, the date of the filing

of complaint for search warrant, had ever seen, heard the voice of, talked to or knew Blanche Smith.

The affidavit stated that Affiant believed the information he received from Long because with each betting transaction in which Long assisted Affiant, and with each item of information that Long related to Affiant, Long was incriminating himself. In fact, Long was never aware that Affiant was a police officer; hence, Long never knew he was incriminating himself (R. 11a).

Affiant further stated in the complaint that he positively identified the voices of John and Pete Smith as being the persons who accepted the horse bets on the telephone. He stated:

> "In addition to the Affiant identifying the voices, the individuals verbally identified themselves when talking to the Affiant on the telephone."

Both of these statements were found in the testimony to be untrue, the Affiant himself saying that he could not identify the voices, without their having identified themselves, and that the only identification was the first name.

The Superior Court was kind enough to give the Commonwealth the advantage of having that information considered in favor of the Commonwealth, since it was under the mistaken assumption that Respondent was convicted of the crime of bookmaking, whereas in fact Respondent was acquitted of the crime of bookmaking and Respondent should have been given the benefit of any question with respect to the name.

It was further indicated in the complaint for search warrant that the telephone listed was under the name of

S. M. Graeff, c/o Pete Smith, Mounted Route, Enola, Pa. The Affiant did not inform the District Justice that there were two Pete Smiths, a father and a son, and that further S. M. Graeff was the girl friend of the Pete Smith who was not a defendant in this case. In fact, when the Commonwealth called that Pete Smith and questioned him about these matters, he refused to answer on the grounds that it would tend to incriminate him.

The Respondent herein was not at or near the premises at the time the search warrant was served.

The Cumberland County Court in an order dated May 5, 1976, upheld the validity of the search warrant, and therefore the admissibility of the items seized in the execution of the warrant on November 22, 1975.

On May 11, 1976, a jury sitting before The Honorable John C. Dowling of the Twelfth Judicial District, specially presiding, found Respondent not guilty of bookmaking but guilty of permitting bookmaking and pool selling upon premises owned or occupied by him.

All charges against Respondent were originally discharged by the District Justice, since the Commonwealth was unable to produce evidence to indicate ownership of the premises involved, and it was only after Respondent was rearrested sometime later that the Commonwealth was able to produce any evidence at all with respect to ownership of the property, and that, of course, was substantially after the complaint for search warrant had already been issued.

Evidence obtained pursuant to the search warrant was admitted at trial and was material to the conviction.

On May 12, 1976, motions for new trial and in arrest of judgment were filed, and on June 8, 1976, supplemental motions for new trial were filed.

On September 10, 1976, the opinion of The Honorable Dale F. Shughart and The Honorable John C. Dowling overruling the post-trial motions was filed. This decision is reported in 26 Cumb. 311 (1976).

On November 29, 1976, Respondent was sentenced by The Honorable John C. Dowling, and Respondent's notice of appeal and proof of service were filed that same date.

Following sentencing on November 29, 1976, an appeal followed to the Superior Court of Pennsylvania and the Superior Court of Pennsylvania in it's opinion dated October 6, 1977, sustained Respondent's motion and remanded the case for a new trial.

The Supreme Court of Pennsylvania denied the Commonwealth's appeal for allocatur in its order dated January 27, 1978.

ARGUMENT OPPOSING WRIT

To state as a reason for granting the writ that the Supreme Court of the United States has never considered standards of review to be applied in determining the existence of misstatements in affidavits in support of probable cause is not correct at all, since the Supreme Court of the United States has on a number of occasions not only considered the situation but has laid down guidelines which the State Courts should follow in determining any problem involving intentional, reckless or negligent misstatements.

It leaves to the lower courts their discretion and their interpretation as to which of the guidelines a particular case fits into, and what determination should be made within those guidelines.

In *United States v. Thomas*, 489 F.2d 664 (1973), the Court stated that affidavits are invalid if the error was committed with an intent to deceive the magistrate, whether or not the error is material to the presenting of probable cause; or if made nonintentionally, the erroneous statement is material to the establishment of probable cause for the search.

This view has been considered and sustained in *United States v. Dunnings*, 425 F.2d 836 (2nd Cir. 1969), cert. den. 397 U.S. 1002, 90 S.Ct. 1149, 25 L.Ed. 2d 412; *United States v. Halsey*, 257 F.2d 1002 (S.D.N.Y. 1966).

The Supreme Court of the Uited States has left to the individual States the determination of whether or not

they should permit an investigation into the veracity of statements made in a complaint for search warrant. Pennsylvania, in *Commonwealth v. Hall*, 451 Pa. 201, 204, 302 A.2d 342, 344 (1973), had determined and is one of those States which permits challenging such veracity. This position is not disputed by the Commonwealth.

The Supreme Court of the United States recently made a decision on the question of whether or not a hearing should be held at the defendant's request into the question of truthfulness of certain factual statements. The Court heid in *Jerome Franks, Petitioner v. State of Delaware*, No. 77-5176, June 26, 1978, where there are allegations of deliberate falsehood of reckless disregard pointed out with supporting reasons and an opinion of proof, including affidavits or sworn or otherwise reliable statements of witnesses or a satisfactory explanation of their absence, an evidentiary hearing is mandated.

In *Jones v. United States*, 362 U.S. 257, 270, 271 (1960), the Supreme Court at that time made the flat and clearly sensible statement:

> "It would be an unthinkable imposition upon his authority if a warrant affidavit revealed after the fact to contain a deceptive, reckless or false statement were to stand beyond impeachment."

None of the courts below seriously doubted the existence of misstatements in this search warrant which were clearly within the knowledge of the Affiant and the Superior and Supreme Courts of Pennsylvania expressed their displeasure in their conclusion in favor of the Respondent herein.

The case at bar differs from the *Thomas* case, supra, because in our case the Affiant knew that the name Smith was never used; he knew he had not spoken to Respondent during the period he stated; he knew he had never become acquainted with Respondent; he knew he had never personally placed bets with Respondent; he knew at the time he served the warrant he had no proof of the ownership of the real estate; he knew, or should have known, Respondent had a son with the same name, because another officer with whom Affiant was working on the very same case was personally aware of the entire situation concerning S. M. Graeff and the Respondent's son; he knew that Robert Long was not an informant as the term is used by our courts; he knew he had never met, spoken to, or even seen Blanche Smith at the time the warrant was sworn out; he knew he had only heard Respondent's voice some time between 14 months to two years before and said he had spoken to him during the September and November immediately before the raid.

In the *Thomas case*, supra, the inclusion of the name Finley was the only misstatement, and the officer in that case had reason to believe his statement and the use of the name Finley and it was unintentional and not for the purpose of misguiding the magistrate as in the case before the Court at this time.

One or two misstatements might be unintentional; but this case shows a clear pattern conceived to mislead the Magistrate into believing that matters which had not taken place did take place, and these were material to the decision of the magistrate on the question of probable cause. Such action by the Affiant in our case requires

dismissal of the warrant and the fruits of the search. *United States v. Loona,* 525 F.2d 4 (1975), cert. den. March 22, 1976, 96 S.Ct. 1459.

Giving this search warrant a non-grudging and non-negative attitude either for or against its validity because they are normally drafted by non-lawyers in the midst and haste of a criminal investigation, a normal interpretation would sustain the Pennsylvania Superior Court and the Pennsylvania Supreme Court in their conclusions.

This case does not permit the Court to review the impact of misstatements in search warrant affidavits on the determination of the existence of probable cause, where there are sufficient facts in the affidavit excluding the misstatements which would support probable cause to search, because it has never been shown that, excluding the misstatements in the search warrant, such probable cause did exist. In fact, all of that was ruled upon by the Superior Court and sustained by the Supreme Court.

In reviewing the petition presented to the Supreme Court of the United States by the Commonwealth, it is interesting to note that the Commonwealth does not dispute the right of the Respondent to challenge the veracity of facts but attempts to indicate that this prerogative is not premised on the assumption of perjury by law enforcement officers. It does not, however, exclude the possibility of perjury, or the shading of facts in order to present a picture to a District Justice which will influence his opinion to issue a search warrant when, in fact, much of the information given to him for his consideration is not only not factual but, in many instances, known by the affiant to be non-factual.

We are pleased that the complaint for search warrant should be reviewed, as the ordinary man would view it, and the ordinary man would have viewed these misstatements as being untrue and in the light shown by the Superior Court.

There does not appear to be confusion in the Pennsylvania Courts regarding the question of effect of misstatements in search warrant affidavits. What has been reviewed and is being acted on by our Pennsylvania Superior and Supreme Court is the question of what is the factual situation concerning the individual search warrant; and this is the only way that this matter can be approached, regardless of what guidelines are set by a higher court. You will always have to review what took place in the individual case in order to determine whether or not the guidelines have been met. The Superior Court of Pennsylvania did that in this case, does it in its other cases; and in those cases in which the Supreme Court feels that the warrant should be upheld, it upholds the warrant, and in those in which it feels it should not be upheld, as in this case, it strikes down the warrant.

In the Commonwealth's petition it is indicated that there is no question concerning the listing of the telephone number under S. M. Graeff, care of Pete Smith, and says that that fact was not challenged. That is not true at all. We do challenge that and did challenge that, as we indicated earlier in this response, and at the trial of this case. In view of the fact that there were two Pete Smiths and it was not the Respondent Pete Smith who was keeping company with S. M. Graeff, but it was his son who kept company with S. M. Graeff, and there is no indication that it was not that Pete Smith who listed the telephone

at the home in which he was living at the time, the Court was additionally misled. As the court stated and the District Attorney states, we are dealing with probabilities, and there is greater probability that the younger Pete Smith, who was living at the home at the time, and who was keeping company with S. M. Graeff, had the telephone listed in that manner rather than the father.

With respect to the case cited by the lower court and reiterated in the petition, *Aguilar v. Texas*, 378 U.S. 108, 114-115 (1964), we state categorically that there was nothing in any of the hearings held in this case or at the trial to indicate that Mr. Long was an informant or was ever in the home of Peter Smith, or that he ever knew what would be in the home of Peter Smith, or where the telephone was that he had a number to; and further there was nothing to establish his reliability as an informant, not even a statement made by the police officers as his ever having given any information to them at all, except to say that he had never given them any information which led to the arrest or conviction of any individual. There was no firsthand information of the Affiant with respect to Peter Smith that is discernible in any of the hearings or the trial, and, as it was urged below, there was no meeting of the *Aguilar* test by the District Attorney's Office, and Mr. Long was not considered a reliable informant except that he was alleged to have been incriminating himself when, in fact, he did not know at all that he was incriminating himself, which would destroy that approach. Self-incrimination, as relied on in Pennsylvania, are those cases in which an informant knowingly turns over information to the police and in so doing involves himself in the crime. This was not done in the case at bar.

For the District Attorney to allege in paragraph 14 that the sole import of the inaccuracies is that the officer knew the last name of the Respondent to be Smith and used that in the complaint for search warrant, is an absolutely and totally incorrect conclusion in view of everything that has been hereinbefore indicated and which took place at the various hearings and at trial.

This Court should not become involved in attempting to analyze the facts which were determined by the court below.

The case at bar is not the case which should be used to have the Court address the question of what constitutes misstatements in search warrant affidavits, and is not one in which the standards of review to be applied in determining the existence of misstatements in affidavits in support of probable cause to search required by the Fourth Amendment to the Constitution should be considered.

It is the contention of the Respondent that the material misrepresentations upon the face of the affidavit for search warrant, which admittedly existed and which were determined by the Superior Court in an opinion by Judge Spaeth, totally precluded a neutral, objective and detached determination of the existence or non-existence of probable cause for the issuance of a search warrant. The position of Judge Spaeth and the majority of the Superior Court was sustained by a per curiam opinion of the Supreme Court of Pennsylvania.

In the Superior Court's opinion on page 2, the court indicated there was no dispute that the evidence established that appellant owned the premises where the gambling paraphernalia was found and the telephone over which the bets were taken was located.

There was, however, a serious dispute as to whether or not the telephone was the telephone of the Respondent or of his son, also named Peter Smith, as is the Respondent; and the son, Peter Smith, who was called by the Commonwealth at trial refused to answer that question on the grounds that it would tend to incriminate him. He was a Commonwealth witness when this took place.

It is also important to note that the telephone was listed in the name of S. M. Graeff in care of Pete Smith, and that the testimony indicated that S. M. Graeff and Peter Smith, the son of the appellant, kept company together and were, in fact, the parents of children to each other. This fact was known, according to a State Police Officer who testified at the hearing. However, by placing that statement in the complaint for search warrant in the manner in which it was placed, it gave the District Justice the implication that the Peter Smith referred to was the Respondent herein and not the son.

There was also information to the effect that young Peter Smith and the elder Peter Smith were both at Joe's Bar and that young Peter Smith was seated at the table with his father when the police officers actually came in. Although the officers had a warrant simply for one Peter Smith, they elected to arrest the elder Peter Smith and not the younger Peter Smith.

It is interesting to note that the Superior Court gave the Commonwealth an additional advantage when it is questionable that such advantage should have been given; that is, the court noted in its opinion that they must review the testimony in the light most favorable to the verdict winner. They were at that point referring to the fact that the telephone was answered by a person who said:

"This is Pete", and the verdict winner in the lower court as to that phase of the case was the Respondent, since the Respondent was found not guilty of the charge of bookmaking and, consequently, the testimony should have been considered in a light more favorable to him.

It is felt, and apparently approved by the Superior and Supreme Court of Pennsylvania, that a material misrepresentation in a complaint for search warrant as to the factual basis for a finding of probable cause for the issuance of a warrant precludes an objective and detached determination of the existence of probable cause by the issuing authority.

The leading Pennsylvania decision on the question of material misrepresentation in affidavits for search warrants is *Commonwealth v. D'Angelo,* 437 Pa. 331, 263 A.2d 441 (1970), in which the Supreme Court held an affidavit for search warrant, that was sufficient upon its face, to be constitutionally insufficient due to the existence of a single material misrepresentation among the averments of the affidavit.

During a police lineup, the victim of the alleged robbery stated that D'Angelo looked like the holdup man, but that he could not be sure. D'Angelo was released from custody and on the following day the police secured a search warrant for D'Angelo's residence, based upon an affidavit which included an averment that D'Angelo had been identified as the person who attempted to rob the victim, but that the victim could not make positive identification unless he could view the clothing that was worn by the robber.

The search resulted in the seizure of a sweater which, when displayed to the victim, elicited a statement by the

victim that D'Angelo was the man. The victim also stated he was certain of his identification at the lineup but did not say so because he did not want to become involved.

In reversing the conviction, the court stated at 437 Pa. page 336, 263 A.2d 444:

> "It is clear from the record that the affidavit filed with the magistrate which caused the search warrant to issue was incorrect and misleading when it stated, 'D'Angelo has been *identified* as the person who entered Fines (sic) store . . .' for the Commonwealth's own evidence establishes that as of that moment this was not the case. (Emphasis ours.) This, in our view, so tainted the search that the evidentiary use of the fruits thereof, violated due process of law and, in itself, requires a reversal of the conviction and judgment."

The court reached this conclusion, even though the immediately succeeding averments of the affidavit qualified the identification of D'Angelo as uncertain.

In further discussing the fundamental necessity for an objective self-determination by the magistrate of the existence of probable cause, the court stated at 437 Pa. 337-338, 263 A.2d 444:

> "In the instant case, the information supplied the magistrate in the affidavit, when considered in its entirety, was unquestionably sufficient to warrant a reasonable man in the conclusion that probable cause existed to issue the search warrant. But, this information was untrue and misleading in one very important respect. Moreover, the testimony at trial supports no other conclusion but that the police who

supplied the information knew it was not in accord with the then existing facts. Under such circumstances, the warrant was invalid and the use of evidence resulting from the search based thereon was constitutionally proscribed. . . . To rule otherwise would permit the police in every case to exaggerate or to expand on the facts given to the magistrate merely for the purpose of meeting the probable cause requirement, thus precluding a detached and objective determination."

The only significant distinction between *D'Angelo* and the present case is that the cumulative weight of several basic and material misrepresentations combine to constitute a far more dangerous exaggeration or expansion upon the facts than existed in *D'Angelo,* totally precluding any opportunity for the constitutionally mandated objective and detached determination of the magistrate of the existence or nonexistence of probable cause for the issuance of the search warrant.

Here, the most glaring and reckless or intentional misrepresentations of the Affiant fall within the category of the officer's following averments on the face of the affidavit of acquaintance and personal involvement with the Smiths:

> "The affiant became acquainted with Pete, John and Blanche (sic) SMITH through Robert Harry LONG." (R. 4a).
>
> * * *
>
> "Between October 2, 1975, and November 19, 1975, the affiant personally was involved in playing football tickets with Pete and John SMITH through Robert Harry LONG of Carlisle, Penna." (R. 2a)

The obvious intent of these averments was to create in the mind of the magistrate an impression of intimate, detailed and well-founded knowledge on the part of Affiant with respect to various alleged illegal activities of the Smiths, and further that Affiant had engaged directly with the Smiths in illegal gambling activities after having been first introduced to the Smiths by Long.

That both the averments as to acquaintanceship and as to personal involvement were direct falsehoods is obvious from the record of Affiant's testimony at the suppression hearing:

> "Q. Now, prior to the date of the arrest, which I believe you testified was November 22, 1975, is that correct?
>
> "A. Yes, sir.
>
> "Q. Prior to that date had you ever personally met Blanche Smith?
>
> "A. No, sir.
>
> "Q. Had you ever talked to Blanche Smith on the telephone?
>
> "A. Prior to November 22?
>
> "Q. Right, had you ever heard her voice on the telephone?
>
> "A. I heard her voice on several occasions, at which time I talked to a woman on the phone at that location who identified herself as Blanche, and on November 22, 1975, there was no doubt in my mind that Mrs. Smith was the Blanche that I talked to on the phone previously.
>
> "Q. Officer, maybe I am not making myself clear, you swore out this search warrant on November 21, 1975, isn't that correct?

"A. That is correct.

"Q. You had never heard--you had never met Blanche Smith?

"A. That's correct.

"Q. You had never seen Blanche Smith on November 21, 1975?

"A. That is correct.

"Q. And yet you stated, did you not, that the affiant, meaning you, became acquainted with Pete, John and Blanche Smith through Robert Harry Long?

"A. That is correct.

"Q. You had never met her at the time you made that statement, is that correct?

"A. I never met her personally.

"Q. Did you ever meet Pete Smith personally?

"A. Not personally.

[R. 11a-13a]

* * *

"Q. Thank you. Now, you a little later, about the middle of the paragraph, you state that the affiant, meaning you, personally was involved in playing football tickets with Pete and John Smith through Robert Harry Long of Carlisle, Pa. Is that what it says on the document?

"A. Yes, that's correct.

"Q. Now, were you ever personally involved, did you actually ever hand a football ticket to Peter Smith?

"A. No, sir."

It should be stated parenthetically that all references to false statements, throughout this review of the contents on the face of the affidavit relative to Blanche and John Smith are pertinent in that they would tend to encourage the magistrate to issue the subject warrant under deception, even though the statements do not relate directly to Respondent.

It is significant that the same Superior Court had originally indicated that in the case of *Commonwealth v. D'Angelo*, 437 Pa. 331 (1970), the evidence did not invalidate the search warrant; however, upon appeal to the Supreme Court of Pennsylvania, the *D'Angelo* case was reversed. *Commonwealth v. D'Angelo*, 437 Pa. 331, 263 A.2d 441 (1970). The court reversed, stating that the misleading and incorrect information so tainted the search that the evidentiary use of the fruits thereof violated due process of law and, in itself, requires a reversal of the conviction and judgment. *Id.* at 336, 263 A.2d 441 (1970), at page 444.

In the case at bar, Respondent had not only one incorrect and misleading piece of information but a complete series of misleading and incorrect information which the police officers, in fact, knew to be false; and they testified at the trial and the suppression hearing that the facts were not as they had indicated on the complaint for search warrant.

We agree with some of the cases cited in the petition of the Commonwealth; for example, a quotation in the petition from *United States v. Ventresca*, 380 U.S. 102 (1965), which indicates in the opinion by Chief Justice Burger that these search warrants must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion. 380 U.S. at 108, 85 S.Ct. 746.

We then realize quite clearly that the Superior Court gave a normal, sensible interpretation to the words in the

search warrant, in the same manner as a magistrate would have given them, and did give them when it was presented to the magistrate. For example, the words "became acquainted" were indicative of a personal relationship and a later attempt to explain what was meant brings us to the position that the lower court adopted by trying to qualify the false averments as to its definition after the fact.

There is no doubt that the name "Smith" was never used in any of the telephone conversations and an attempt was made to make it appear as though the name "Smith" was used in each case, by not only adding the word "Smith" but adding it in capital letters, so that it stood out on the search warrant.

The suppression hearing testimony and the pertinent portions of the record which were submitted to the appellate courts in Pennsylvania made it quite clear that the Commonwealth's conclusion that there were no misstatements or representations was totally incorrect.

In the petition for allocatur to the Supreme Court of Pennsylvania, the Commonwealth retreated to the approach that even misstatements do not necessarily invalidate a search warrant, and in a given case they may be correct; but in the cases cited by the Commonwealth, as was demonstrated, were not within the purview of the case at bar.

The fact that the misstatements were known to the police officers makes it a far more serious situation insofar as the injustice of the matter is concerned, but, even if they were not aware of the falsity of the statements, and it was gross negligence or another improper factor that

caused them to include the statements in the complaint for search warrant, it is nevertheless clear that this should invalidate the search warrant as well.

The Fifth Circuit has held that an affidavit supporting a search warrant is invalid if it contains any misrepresentations made with intent to deceive the magistrate, or if a material error is made nonintentionally. *U.S. v. Thomas,* 489 F.2d 664 (5th Cir. 1973), cert. den. 423 U.S. 844 (1975). Accord: *U.S. v. Harwood,* 470 F.2d 322 (10th Cir. 1972); *State v. Boyd,* 224 N.W. 2d 609 (Iowa 1974); *People v. Birch,* 88 Misc. 2d 835, 390 N.Y.S. 2d 524 (1976), where the affidavit there was invalid when based on material unintentional misstatements that were the result of reckless or negligent disregard of a duty of due care.

Where a material error in the affidavit was made and the government agent was either reckless or intentionally untruthful, that would be sufficient to suppress under *U.S. v. Carmichael,* 489 F.2d 983 (7th Cir. 1973).

In *U.S. v. Belculfine,* 508 F.2d 58 (1st Cir. 1974), the court stated that it need not presently decide whether to exclude evidence based on unintentional material errors in affidavits but did hold that an intentional, relevant and non-trivial misstatement in the affidavit would require exclusion of such evidence.

It was clear, according to the Superior Court and the Supreme Court of Pennsylvania that the misrepresentations in our case were material; and in *U.S. v. Thomas,* in the Fifth Circuit Court of Appeals, 489 F.2d 664 (1973), the court noted that in cases in the Fifth Circuit they did consider the question of misrepresentations in

affidavits, and the court held that when you remove the misrepresentations in those instances, and the affidavit would then be lacking in facts tending to show that there was probable cause, naturally everything would be dismissed. This was shown in *U.S. v. Upshaw,* 448 F.2d 1218, at 1222, and in *U.S. v. Jones,* 475 F.2d 723, and *U.S. v. Morris,* 477 F.2d 657 (1973), all Fifth Circuit cases.

The court in the present case attempted to show that, if you did remove all of the misrepresentations that were made in this case, in the court's opinion there would still be probable cause; however, a reading of that situation would show that the court was totally incorrect in many of its assumptions, stating only that there were two items which would indicate that probable cause existed, and the court was not correct in its analysis of those items.

The court relied on the statements of the officer that on eight occasions he had personally placed horse bets and the persons answering identified themselves as Pete, Blanche or John (this flies in the face of the jury's verdict, however; since the Respondent in this case was found not guilty as to that charge).

Further, the court indicated that the phone number was listed under S. M. Graeff, care of Pete Smith; again the court not being aware, since it had not at that time been told that there were two Pete Smiths and that S. M. Graeff was the woman with whom young Pete Smith was friendly and with whom he had children. This was not the Pete Smith involved in the case at bar, but it was his son. The court erroneously, in our view, felt that that was sufficient to constitute probable cause when at

the trial it was clear that such was not the case. It is important to note that the judge who heard the suppression hearing did not preside at the trial, and consequently his opinion was written based on information not available to him by virtue of his not presiding at the trial and learning about the second Pete Smith.

In *U.S. v. Pearce,* 275 F.2d 318, 321-322 (7th Cir. 1960), the court stated:

> "We now hold that a defendant is entitled to a hearing which delves below the surface of a facially sufficient affidavit if he has made an initial showing of either of the following: (1) any misrepresentation by the government agent of a material fact, or (2) an intentional misrepresentation by the government agent, whether or not material."
>
> See generally *U.S. v. Dunnings,* 425 F.2d 836, 840 (2nd Cir. 1969), cert. den. 397 U.S. 1002, 90 S.Ct. 1149, 25 L.Ed. 2d 412.

It is important to note that nowhere in the entire hearing or trial did anyone indicate on the part of the Commonwealth that the misrepresentations were inadvertent or accidental, so far as could be determined.

In *U.S. v. Thomas,* supra, the court stated again, without further citation of authority, they are convinced that there would be a sufficient basis for invalidating a search warrant if the error was intentional, even though immaterial to the showing of probable cause. In fact, a warrant issued following an intentional misstatement of fact by an affiant-agent would present the clearest case for suppression.

In 84 Harvard L. Rev. 825, 1971, there appears an article by Kipperman entitled: "Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence".

In this article, which is quoted in *U.S. v. Thomas,* supra, p. 671, the court states the reasoning and indicates it is worth repeating:

> "This would be a clear case of proscribed government action (perjury) which could be to some degree deterred by quashing warrants based thereupon. One could analogize intentional inaccuracy by the affiant to the knowing use of perjured testimony at trial and hold that the public policy against government distortion requires automatic suppression of the evidence obtained in such a manner, regardless of prejudice. Thus, an intentional misstatement of facts in the affidavit would be fatal even if it were immaterial to proving probable cause, or if, unbeknownst to the lying affiant, the facts alleged in bad faith turned out to be true."

The Commonwealth indicates in their petition that the Superior Court suggested a particular definition of the words "material facts" and consequently cited the case of *Commonwealth v. Wiggins*, 239 Pa. Super. Ct. 256, 361 A.2d 750, as authority for that proposition. A reading of the *Wiggins* case would instantly demonstrate that the facts therein are totally different than the matters before the Supreme Court at this time.

The holding in the *Wiggins* case was that the detective had within his own personal knowledge sufficient facts and circumstances to justify a warrantless arrest, and that rendered a slight misstatement of facts which existed

there as immaterial. There is nothing to indicate there is any slight misstatement of facts in the case at bar; there are serious misstatements of fact; they are throughout the entire complaint for search warrant; and they are such that it is not possible for the District Justice to have given an objective, detached determination.

The Commonwealth also cites *Commonwealth v. Jones*, 229 Pa. Super. Ct. 224, 323 A.2d 79 (1974), in another attempt to substantiate the proposition that misstatements alone were not sufficient to invalidate a warrant. A reading of the *Jones* case, in which a petition for allowance of appeal was denied, indicates that almost totally irrelevant misstatements were made. For example, two statements which were held to be misstatements were: (1) that informant voluntarily came to police headquarters; and (2) he used the terminology "identical weapons". The fact of the matter was that the weapons were very similar and were identified by photographs and, although not absolutely identical weapons, there could be no doubt that he saw the weapon involved in the case. As to the voluntariness of coming into the police station, how he got there was not held to be material, since it was an expression by one of the parties that the informant was brought into headquarters.

There can be no doubt that this is not the same situation and that this fact is clearly demonstrated by the fact that those judges, who sat on the Superior Court and established those two rules of law and have sat on many cases in which this very point was determined, even subsequent to the time that this case was heard, are the very same judges who have sustained the position of the Respondent in this case, so they obviously recognized the

difference between material and immaterial matters, and correctly so, and that the matters contained in the case at bar were certainly material misrepresentations which were known to the police officers at the time the misrepresentations were made.

The fact of the existence of two Pete Smiths, however, was known to the police, as is indicated in the pertinent portions of the record being filed with this brief (R. 34a).

It is obvious from the foregoing, coupled with the interrelated misrepresentations detailed hereafter, that the close relationship which the averments infer did not exist, and that the misrepresentations with respect to relationship require refusal of allocatur under the authority of *D'Angelo,* supra. These representations do not, however, stand alone.

A third and equally important misrepresentation, which if true would have greatly enhanced the sufficiency of the affidavit in the absence of the other misrepresentations, is the following bold statement by Affiant (R. 2a):

> "The affiant believes LONG since he is incriminating himself by indicating that Pete SMITH is the person running the gambling operation and that through LONG the affiant has been able to place bets by telephone with Pete Smith."

It is immediately obvious from the record of the suppression hearing that Long had no knowledge whatsoever that he was incriminating himself during any stage of Affiant's investigation:

> "Q. Now, was Robert Harry Long an informant?

> "A. No, sir.
>
> "Q. Did Robert Harry Long know that you were a police officer?
>
> "A. No, sir.
>
> "Q. So that when Robert Harry Long was giving you information he was not doing it as an agent of the police or as an informant for the police, is that not correct?
>
> "A. That is correct.
>
> "Q. And, in fact, were you not gathering information to prosecute Robert Harry Long?
>
> "A. Yes, sir, and the persons behind him in the operation."
>
> (R. 11a).
>
> "Q. Had Harry John, Robert Harry Long, is that his name, Robert Harry Long, ever given you information that led to the arrest of any person prior to the time that you arrested Harry Long, or Harry Robert Long?
>
> "A. Robert Harry Long was not aware that I was a policeman. I was involved with Mr. Long in an undercover investigation. Anything he gave me was given to me not knowing I was a policeman."
>
> (R. 24a).

It is very clear that in all of his contacts with Affiant, Long thought that he was simply involved with a person interested in gambling. He had no idea that he was dealing with a police officer who was operating under cover with an assumed name (R. 13a).

But what did the magistrate think from a reading of the affidavit? The only permissible inference is that Long

was knowingly cooperating with the police in some inexplicable fashion against his own penal interest, which again was obviously untrue, as Affiant well knew.

Since Long was not knowingly incriminating himself through his dealings with Affiant, what remains in support of the constitutionally indispensable finding of the reliability of Long?

Long's reliability was not established through telephone corroboration by Affiant for the following reasons, the acknowledgment of which is central and vital to the protection of the fundamental Fourth Amendment protections of Peter Smith.

There is nothing upon the face of the affidavit to connect the telephone number allegedly given to Affiant by Long to any particular plot of real estate or to any particular building upon any plot of real estate.

There is nothing upon the face of the affidavit which indicates that any representative of the telephone company showed Affiant where the telephone line for the particular number fed into any particular building or that any postal officials or anyone else showed Affiant a particular real estate premise with which S. M. Graeff or Pete Smith had any connection whatsoever.

There is nothing upon the face of the affidavit which indicates that Long or Affiant had ever been in the premises which were ultimately searched and saw the telephone with the indicated number displayed upon the dial or had seen illegal activity being conducted.

There is nothing upon the face of the affidavit which indicates that the premises ultimately searched were placed

under surveillance and that either Pete Smith or S. M. Graeff, in whose name the number was allegedly listed, were seen entering or departing the premises.

There is not even any indication that the Affiant made any reliable determination whatsoever as to where S. M. Graeff or Pete Smith lived, even assuming that such information would have established that the indicated telephone number was assigned to such a dwelling. In fact, Affiant even admitted that he did not know who owned the subject premises when he executed the affidavit (R. 25a).

From the face of the affidavit, Affiant could have been calling any premises on Mounted Route, Enola, Pennsylvania. Therefore, even if Affiant's statements that he was speaking to John, Blanche and Pete *Smith* over the telephone on repeated occasions were to be accepted as true, there was no information upon the face of the affidavit which would have authorized the search of the premises, which was ultimately searched, or the search of any particular premises.

In its opinion upon the suppression issue adopted from the companion proceeding against Blanche Smith, the court below stated that all of the information supplied by Long, although hearsay, was corroborated independently by Affiant and by Long's self-incrimination in that connection, citing *Commonwealth v. Rose*, 211 Pa. Super. 295, 235 A.2d 462 (1967).

From the foregoing testimony, it is manifestly clear that Long was not knowingly incriminating himself and, thus, that *Commonwealth v. Rose* is wholly inapplicable. It is equally clear from the face of the affidavit that, as

set forth above, Long's information was not corroborated as to any specific real estate parcel or building.

It is without question that hearsay evidence advanced in support of the issuance of the search warrant must be accompanied by facts from which Affiant concludes that the source of the hearsay information is reliable. This is the second element of the well-known two-prong test of *Aquilar v. Texas*, 378 U.S. 108 (1964).

Fourthly, each time Affiant made reference to Pete, Blanche or John in the affidavit, he added the surname "SMITH" in all capital letters, a total of fifteen times. From the record, there is no question that Affiant realized that the parties on the other end of the telephone line never identified themselves as Smiths; yet he made no attempt to qualify the averment, such as to say that he believed that the parties were Smiths, although they never specifically identified themselves as such.

This is a very important and material averment and must have made a substantial impression upon the magistrate; but it was absolutely false.

The fifth material and inaccurate averment in the affidavit was that Affiant "positively identified" the voices of John and Pete Smith over the telephone, *and that, in addition to his own identification,* the individuals verbally identified themselves when talking to Affiant on the telephone.

This averment is suspect with respect to Pete Smith, in that Affiant admitted at the suppression hearing that he could not positively identify the voice of Pete Smith.

> "A. There is no way that I can say that I could have possibly identified his voice—he did say this is Pete. And that was a big factor in identification. I would be lying if I said on the voice alone without the salutation that I would be positively able to identify him because it didn't happen that way."
>
> (R. 14a)

Once again, the effect of the words "positively identified" in the absence of any qualification with respect to the use of the surname "Smith" must have made a significant impression upon the magistrate.

Finally, Affiant averred that he had heard the voices of John and Pete Smith on numerous occasions during the investigation between September 27, 1975, and November 11, 1975. However, at the suppression hearing Affiant once again admitted the variance of the averment from the truth:

> "Q. Have you ever heard Peter Smith's voice any place after September of 1975?
>
> "A. Not to the best of my knowledge.
>
> "Q. You will note, officer, on the complaint for search warrant there is a statement that the affiant has heard the voices of John and Pete Smith on numerous occasions during the investigation that began 27 September 1975 and 11 November 1975. Is that on there? It is the second paragraph of the second page.
>
> "A. That is correct."
>
> (R. 23a)

This inaccuracy was further revealed through Affiant's testimony at trial:

> "Q. Were you asked and did you respond as follows: (reading)

Question: Had you ever spoken to Peter Smith over the telephone before?

Answer: No, sir.

Question: So you don't know how his voice sounded over the telephone? And as I understand what you said, you had not spoken directly to Peter Smith at any time?

Answer: That is correct.

Question: But you had just overheard Peter Smith talking to someone else?

Answer: That is correct.

Question: On another occasion?

Answer: That is correct.

Question: How long ago had that been?

Answer: I don't recall.

Question: Was it a week, 2 weeks, a month?

Answer: I don't recall.

Question: Could it have been 2 weeks, could it have been a month?

Answer: I don't recall.

Question: Are you saying you don't recall if it could have been 2 months or 3 months?

Answer: I don't recall at this time. It was fresher at the date of the original preliminary hearing, but I don't recall the time sequence. It was on more than one occasion that I heard his voice.

Question: Was it within a period of 5 months?

Answer: I don't recall.

Question: You don't recall if it was within a period of a year?

Answer: I don't recall.

Question: You don't recall if it was within a period of a year?

Answer: No.

Question: Was it within a period of 2 years?

Answer: It would have been within a period of 2 years.

Question: It would have been within a period of 2 years. You do not recall it within a period of 1 year, but you are sure within a period of 2 years?

Answer: Definitely because I started working vice in May of 1974. I believe it would have been after May of 1974 and prior to September or October of 1975.

Question: So sometime between May of 1974 and September of 1975 you heard this voice, but you don't remember when?

"Q. Is that correct?

"A. That is very correct.

"Q. Did you say in the affidavit before the District Justice: 'The affiant has heard the voices of John and Peter Smith on numerous occasions during the investigation that began on 27 November, 1975, and 11 November, 1975'?

"A. That is correct.

"Q. Where had you heard Mr. Smith; where had you overheard Mr. Smith?

"A. On one occasion, it was in the Enola Sportsmen's Club."

(R. 30a-32a)

From Affiant's testimony at trial it is obvious that Affiant had no direct knowledge of the sound of Pete Smith's voice over the telephone and that he had only overheard Pete Smith talking to someone else in a club room at an indeterminable time within the sixteen months

prior to September of 1975. There is no indication anywhere but in the affidavit that Affiant had heard the voice of John Smith between September 17, 1975, and November 11, 1975.

The magistrate was undoubtedly impressed with Affiant's statement that he "positively identified" the voices of John and Pete Smith over the telephone when told that Affiant had heard their voices on numerous occasions during the several weeks prior to the execution of the search warrant. However, if the magistrate had known that no one ever identified himself as Smith over the telephone and that Affiant did not possess the indicated independent familiarity with the voices of the individuals in question, the search warrant may well not have issued.

The only response of the county court in the suppression hearing opinion to the material misrepresentations was that the magistrate could have disregarded them and the county court felt there would still be probable cause. The *D'Angelo* case, supra, negates that approach; and, further, it is highly doubtful whether valid probable cause existed or could have been considered by the magistrate absent the material misrepresentations.

In addition to being wholly violative of the lessons of *Commonwealth v. D'Angelo*, 437 Pa. 331, 263 A.2d 441 (1970), this approach totally ignores the fact that there was nothing upon the face of the affidavit to connect the telephone number with any specific premises. Also ignored is the cumulative impact of the several misrepresentations upon the mind of the magistrate.

There have been many decisions from other jurisdictions wherein search warrants have been invalidated for

the presence of misrepresentations in the affidavit. One prominent example is the decision in *State v. Payne*, 544 P.2d 671 (Ariz. 1976), in which the officer averred that the informant stated that he personally observed heroin in the defendant's possession. When it later developed that the informant had not personally observed heroin in the defendant's possession, the State attempted to qualify the term "observed" as a shorthand method of stating the informant's conclusion that defendant had heroin in his possession as opposed to an indication that the informant actually saw the heroin.

In rejecting this attempted qualification, the court held that the only reasonable interpretation to which the term "observed" was susceptible was that the informant actually saw heroin in the defendant's possession.

The rejected attempt at qualification by the State in *Payne* is strikingly similar to Commonwealth attempts in the present case to interpret the phrase "became acquainted with" as it relates to Affiant's description of his activities with the Smiths. The same is true of the phrase "personally involved in betting" as developed earlier herein.

In *State v. Manoff*, 502 P.2d 1138 (Mont. 1972) the Montana Supreme Court held a search warrant invalid where the affidavit contained erroneous averments. The same was true in *King v. United States*, 282 F.2d 398 (4th Cir. 1960), and *People v. Alfinito*, 16 N.Y.2d 181, 211 N.E.2d 644 (1960), cited in *Commonwealth v. Hall*, supra. See also *United States v. Thomas*, 489 F. 2d 64 (5th Cir. 1973); *United States v. Belculfine*, 508 F.2d 58 (1st Cir. 1974); and *State v. Boyd*, 224 N.W. 2d 609 (Iowa 1974).

Even assuming an absence of active perjury, the Supreme Court did not require such active misconduct on the part of the law enforcement officials in *Commonwealth v. D'Angelo*, supra, and *Commonwealth v. Hall*, supra, as a basis for invalidating the search warrants. All that was necessary in *D'Angelo* was a reasonable possibility that the magistrate may have been misled, and all that was necessary in *Hall* was the possibility that some of the information in the affidavit may have been inaccurate. Furthermore, even if we assume the absence of active perjury on the part of Affiant in the present case, it is evident that his erroneous averments present more than isolated good faith, negligent or inadvertent errors. The present erroneous averments, considered individually and in combination, display at least a series of systematic and deliberate embellishments of the facts from which the only permissible inference is an attempt by Affiant to bolster the facts presented to the District Justice where there was no clear connection between alleged illegal activity and any particular real estate premises.

In so coloring the facts, Affiant at a minimum took reckless and constitutionally impermissible liberties with the truth and placed an unwarranted aura of firsthand reliability upon the affidavit to conceal its otherwise doubtful basis. In so doing, Affiant committed a flagrant overreaching and usurpation of the function of the magistrate, and so precluded a neutral, objective and detached determination of the existence or non-existence of probable cause for the issuance of a search warrant. We cannot now ignore these misrepresentations and attempt to look into the magistrate's mind in an effort to determine

if he would have issued the search warrant absent all of the evident misrepresentations as to facts and reliability.

We conclude, noting that the Commonwealth states that, even disregarding the "misstatements" in their entirety, the warrant is replete with facts supporting the issuance thereof; no such facts are listed in the entire petition. There are some self-serving declarations made in the petition, which are unwarranted by the evidence and the Superior Court, who had before it the pertinent record of this case as filed by appellant and not objected to by the Commonwealth, indicates that there was available all of the matters upon which the Superior Court arrived at its conclusion.

For these reasons, it is strongly urged that the petition for Writ of Certiorari be denied, and that the ruling of the Superior Court and Supreme Court of Pennsylvania be sustained insofar as the search warrant is concerned. It is further urged that by virtue of the arguments herein noted, and the reasons herein stated, indicate that the prongs of the *Aguilar* case were not met (*Aguilar v. Texas*, 378 U.S. 108, 114-115 (1964)) nor were the matters involved in *Spinelli v. United States*, 393 U. S. 410 (1969), complied with.

CONCLUSION

It is the position of the Respondent that the Supreme Court of the United States has already considered the position with regard to standards of review to be applied in determining the existence and effect of misstatements

in affidavits in support of probable cause. Guidelines have been laid down which the State Courts can follow to properly arrive at solutions in accordance with those guidelines when they determine that an intentional, reckless or negligent misstatement has been made by either an affiant, as in the case at bar, or by someone giving the affiant information.

It is for the State Courts to determine the nature of the misrepresentation and whether or not averments are intentionally false, recklessly false or negligently false, in accordance with the guidelines already laid down in the cases heretofore cited.

Pennsylvania is a State which permits inquiry into false representations and misstatements in a complaint for search warrant and, having the guidelines of the Supreme Court to follow, has established its own precedents and is the proper place in which factual matters and determinations of that nature should occur.

In the case at bar, the highest appellate courts of Pennsylvania have determined, in accordance with the guidelines laid down by the Supreme Court of the United States, that there were material misrepresentations in the complaint for search warrant which prohibited the District Justice from making an objective determination as to probable cause.

There was a multiplicity of misrepresentations, as has been pointed out in the argument herein, and the petition for writ of certiorari should be dismissed, and, following the guidelines of the Supreme Court of the United States, it would appear further that the entire case against the Defendant should fall by virtue of the fact that the

District Attorney, by his filing of the petition, indicates that without the material suppressed the case against the Respondent would not exist.

Respectfully submitted,

Goldberg, Evans & Katzman,

By: Arthur L. Goldberg

Attorneys for Respondent